

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION No. 12542 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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NATWARLAL CHHOTALAL JARIWALA & 3 - Petitioner(s)
Versus
BALKRISHNA CHIMANLAL BAIRAGIWALA & 9 -
Respondent(s)

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Appearance :

MR UTPAL M PANCHAL for Petitioner(s) : 1 - 4.
 RULE SERVED for Respondent(s) : 1,
 MS KJ BRAHMBHATT for Respondent(s) : 1,

MR YN RAVANI for Respondent(s) : 2 - 10.

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 15/06/2007

ORAL JUDGMENT

1. The petitioners – original defendants have filed this petition under Article-227 of the Constitution of India praying for quashing and setting aside the order dated 7.3.2003 passed by the learned Judge of Small Causes Court, Surat below an application Ex.28 and the order dated 31.3.2004 below an application Ex.30 in Small Causes Suit No.223 of 2002 seeking permission to file written statement in the said Suit No.223 of 2002 and application Ex.5 pending before the Small Causes Court, Surat.

2. This Court has passed detailed order on 29.12.2004 while admitting the petition and granting interim relief by staying the order dated 7.3.2003 below an application Ex.28 and

the order dated 31.3.2004 below an application Ex.30 in Small Causes Suit No.223 of 2002 pending before the Small Causes Court, Surat. While issuing the rule, this Court has observed as under :-

“2. The question that arises for consideration by this Court is whether a defendant can be permitted by a Civil Court or not to file written statement beyond the period of 90 days from the date of service of summons, in light of provisions contained under Order VIII, Rule 1 of the Code of Civil Procedure. In this regard, learned Advocate, Ms. Brahmhatt, has placed reliance on decision of the Apex Court in Dr. J.J. Merchant & Ors. v. Shrinath Chaturvedi, AIR 2002 SC 2931, Andhra Pradesh High Court reported in AIR 2003 Andhra Pradesh 446 and the Karnataka High Court reported in AIR 2004 Karnataka 246. On the other hand, learned Advocate, Mr. Panchal, has relied on the decision of the Apex Court in Topeline Shoes Ltd. v. Corporation Bank, AIR 2002 SC 2487.

3. The Apex Court, in Topeline Shoes Ltd. (supra) held that the time frame provided under Section 13(2)(a) of the Consumer Protection Act is not mandatory and reply filed beyond 45 days cannot be said to be debarred from being taken on record in any circumstance. The power to extend time is subject to the rider of 15 days and it cannot be exercised repeatedly in neglect of the said rider.

4. In Dr. J.J. Merchant (supra), while considering the very provisions of the consumer protection Act, a different view is taken and the Apex Court has referred to provisions contained in Order VIII, Rule 1 of the Code of the amended Code of Civil Procedure, for taking that view and

certain observations are made. However, the question before Their Lordships was not under Order VIII, Rule 1.

5. The provisions contained under Order VIII, Rule 1 and Section 148 of the C.P.C. do require consideration. In this regard, view taken by the Allahabad High Court in *Waqf Mausooma Syed Husain v. Dillep Kumar Jain and Ors.*, AIR 2003 Allahabad 371 also requires consideration. Under the circumstances, the matter requires consideration and, therefore, requires to be admitted. Hence, Rule.”

3. Heard Mr.U.M.Panchal, learned advocate appearing for the petitioners and Ms.K.J.Brahmbhatt, learned advocate appearing for the respondent No.1 and Mr.Y.N.Ravani, learned advocate appearing for respondents Nos.2 to 10.

4. The brief facts giving rise to the present petition are that the petitioners are tenants and the respondent – original plaintiff has filed a Suit for eviction, declaration and permanent injunction before the Small Causes Court, Surat being Small Causes Suit No.223 of 2002 along with an application for interim injunction below Ex.5. Since the petitioners

could not file a written statement and, therefore, the stage of filing the reply was closed. The petitioners thereafter had given an application on 7.3.2003 to permit them to produce the written statement below Ex.28 and the same was rejected. Subsequently, the petitioners have filed another application below Ex.30 for opening the stage of filing the reply and the same was also rejected on 31.3.2004. Being aggrieved by the said order the petitioners have filed present petition.

5. At the time of hearing Mr.Panchal, learned advocate appearing for the petitioners has submitted that the controversy has by and large now resolved by the decision of the Hon'ble Supreme Court in the case of Kailash Vs. Nanhku and others, reported in 2005 (3) Scale 740 / AIR 2005 SC 2441. This very issue has come up before this Court in the Special Civil Application No.13383 of 2004 decided on 4.5.2005, wherein the passages

from the aforesaid decision of the Hon'ble Supreme Court were extensively quoted. The same are as under:-

"Considering the object and purpose behind enacting Rule 1 of Order VIII in the present form and the context in which the provision is placed, we are of the opinion that the provision has to be construed as directory and not mandatory. In exceptional situations, the court may extend the time for filing the written statement though the period of 30 days and 90 days, referred to in the provision, has expired. However, we may not be misunderstood as nullifying the entire force and impact the entire life and vigour of the provision. The delaying tactics adopted by the defendants in law courts are now proverbial as they do stand to gain by delay. This is more so in election disputes because the substantial part, if not in its entirety, the term for which he was elected even though he may lose the battle at the end. Therefore, the Judge trying the case must handle the prayer for adjournment with firmness. The defendant seeking extension of time beyond the limits laid down by the provision may not ordinarily be shown indulgence.

Ordinarily the time schedule prescribed by Order VIII Rule 1, has to be honoured. The defendant should be vigilant. No sooner the writ of summons is served on him he should take steps for drafting his defence and filing the written statement on the appointed date of hearing without waiting for the arrival of the date appointed in the summons for his appearance in the Court. The extension of time sought for by the defendant from the court whether within 30 days or 90 days, as the case may be, should not be granted just as a matter of routine and merely for asking more so, when the period of 90 days has expired. The extension can be only by way of an exception and for reasons assigned by the defendant and also recorded in writing by the Court to its satisfaction. It must be spelled out that a departure from the time prescribed by Order VIII Rule 1 of the Code was being allowed to be made because the circumstances were exceptional occasioned by reasons beyond the control of defendant and such extension was required in the interest of justice, and gave injustice would be occasioned if the time was not extended.

A prayer seeking time beyond 90 days for filing the written statement ought to be made in writing. In its judicial discretion exercised on well settled parameters, the Courts may indeed put the defendants on terms including imposition of compensatory costs and may also insist on affidavit, medical certificate or other documentary evidence (depending on the facts and circumstances of a given case) being annexed with the application seeking extension of time so as to convince the Court that the prayer was founded on grounds which do exist.

The extension of time shall be only by way of exception and for reasons to be recorded in writing, howsoever brief they may be, by the court. In no case, the defendant shall be permitted to seek extension of time when the court is satisfied that it is a case of laxity of gross negligence on the part of the defendant or his counsel. The court may impose costs for dual purpose (i) to deter the defendant from seeking any extension of time just for asking and (ii) to compensate the plaintiff for the delay and inconvenience caused to him.

However, no straitjacket formula can be laid down except that the observance of time schedule contemplated by Order VIII Rule 1 shall be the rule and departure therefrom an exception made for satisfactory reasons only. We hold that Order VIII Rule 1 though couched in mandatory form, is directory being a provision in the domain of processual law.

6. After quoting the aforesaid passages this Court has held that in view of the ratio laid down by the Hon'ble Supreme Court in the aforesaid decision, the trial Court is required to consider the application at Ex.56 afresh.

7. Following the aforesaid judgments of the

Hon'ble Supreme Court as well as of this Court, I am of the view that the petition is required to be allowed. The order dated 7.3.2003 passed below application Ex.28 and order dated 31.3.2004 passed below Ex.30 in Small Causes Suit No.223 of 2002 are required to be quashed and set aside and are accordingly quashed and set aside.

8. Mr.Y.N.Ravani, learned advocate appearing for the respondents Nos.2 to 10, has, however, submitted that no case is made out by the petitioners – original defendants as to why the written statement was not filed in time. It has not been shown that they were prevented by sufficient cause from filing the written statement in time. The learned trial Judge may, therefore, consider this aspect and decide the application on its own merits. The learned trial Judge is, therefore, directed to consider the application Ex.28 seeking permission to file written statement

on its own merits and in view of the aforesaid decision of the Hon'ble Supreme Court.

9. Since the suit is of 2005 and written statement is yet to be filed and the application is yet to be considered by the trial Court pursuant to this order, the trial Court is directed to expedite the suit as expeditiously as possible, preferably within a period of one year from the date of receipt of writ of this order of this Court or from the date of receipt of certified copy, whichever is earlier. Parties are directed to cooperate for early disposal of the suit.

10. Subject to the aforesaid decision and observation, this petition is allowed. Rule made absolute to the above extent without any order as to cost.

(K. A. PUJ, J.)

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